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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Texas Court of Appeals for the Fourteenth District

BRIEF AMICUS CURIAE OF PUBLIC ADVOCATE OF THE UNITED STATES, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, HELP AND CARING MINISTRIES, INC., AND CITIZENS UNITED FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The *amici curiae*, Public Advocate of the United States, Conservative Legal Defense and Education Fund, The Lincoln Institute for Research and Education, Help and Caring Ministries, and Citizen United Foundation are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] All of these *amici* were established, *inter alia*, for public education purposes related to participation in the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to fidelity to the original text of the United States Constitution, including its several Amendments. The Fourteenth Amendment issues presented in this case directly impact the family and are of great interest and importance to these *amici*. In the past, most of these *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

SUMMARY OF ARGUMENT

Petitioners' Due Process and Equal Protection arguments rest upon a wrong view of this Court's power of judicial review. Under Marbury v. Madison, this Court has no legitimate power to interpret the Constitution to conform its guarantees to changing circumstances, but only to expound the constitution's permanent principles in accordance with the original text. To that end, this Court is governed by the express terms and federalist structure of the Fourteenth Amendment, not by petitioners' views of evolving societal practices and mores.

Petitioners' contention that the substantive liberty guarantee of the Fourteenth Amendment's Due Process Clause includes the right of adults to choose to engage privately in sex with a consenting adult of the same sex is contrary to precedent. Petitioners err in calling this Court to overturn Bowers v. Hardwick, because the Bowers holding, not the petitioners' revisionist contentions, is consistent with the true meaning of the substantive Due Process liberty guarantee.

Petitioners' contention that the equal protection guarantee of the Fourteenth Amendment prohibits Texas from discriminating between heterosexual and homosexual deviate sexual intercourse is based upon an unproved assumption that a person's sexual behavior is determined by a "deeply rooted personal characteristic." By such an assumption, Petitioners cannot shift the burden to Texas to prove a rational basis or a legitimate purpose for Texas Penal Code Section 21.06.

ARGUMENT

I. PETITIONERS' ARGUMENTS REST UPON FLAWED CONSTITUTIONAL PREMISES.

Petitioners contend that the Fourteenth Amendment's Due Process and Equal Protection clauses invalidate the Texas Homosexual Conduct Act because the United States Constitution should be read by this Court to mirror what petitioners have described as "a strong national consensus reflecting profound judgments about the limits of government intrusive powers in a civilized society." Pet. Br. at 24. According to petitioners, there is a new national consensus that has rejected "both evenhanded and discriminatory bans on private sexual conduct between consenting adults," and therefore, the Due Process and Equal Protection clauses should be construed by this Court to force the people of the State of Texas to abandon their archaic moral views, and to conform their criminal laws governing human sexuality to those of the majority of the other states. Pet. Br. at 22-24.

At stake in this case, then, is not simply whether the Texas Homosexual Conduct Statute violates the Due Process and Equal Protection guarantees of the Fourteenth Amendment. Rather, Petitioners' argument — that this Court should exercise its power of judicial review to impose upon the people of Texas a moral and legal standard not found in the original text of the Fourteenth Amendment, but found in modern sexual mores and the laws of a large majority of Texas's sister states — undermines the very nature of a written constitution, calls for an illegitimate exercise of this Court's Article III judicial power, and breaks with the federalist structure of the United States Constitution.

A. Petitioners' Arguments Undermine the Basis for Judicial Review in Marbury v. Madison.

In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall observed that the "whole American fabric has been erected" upon the principle that "the people have an **original** right to establish, for their future government, such principles as, in their opinion, shall be most conducive to their own happiness." *Id.*, 5 U.S. at 176 (emphasis added). Furthermore, he noted, since this "original right" cannot nor "ought [not] to be frequently repeated," the principles so established must be "deemed fundamental." *Id.* "And, as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be **permanent**." *Id.* (emphasis added). In order that such permanent principles "may not be mistaken, or forgotten," the Chief Justice continued, "the constitution is written" (*id.*), and because it is written, it is a "superior, paramount law, **unchangeable by ordinary means....**" *Id.*, 5 U.S. at 177 (emphasis added).

These twin standards of permanence and unchangeability by ordinary means, the Marbury court stated, arose from the very essence of a written constitution: "This theory is essentially attached to a written constitution, and, is consequently to be considered, by this court, as one of the fundamental principles of our society." *Id.*, 5 U.S. at 176-77. And, as the Marbury court further observed, in declaring "this Constitution" to be the "Supreme Law of the Land," Article VI contained "particular phraseology ... confirm[ing] and strengthen[ing] the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and **that courts, as well as other departments, are bound by that instrument**." *Id.*, 5 U.S. at 180 (emphasis added).

To be sure, the Marbury court also stated that it is "the

province and duty of the judicial department to say what the law is," but, by this statement, it could not have meant that what it "expound[ed] and interpret[ed]" to be the law is superior to the law as stated in the constitutional text (*id.*, 5 U.S. at 177). To the contrary, the Marbury court emphasized that a judge, like a legislator or an executive officer, "take[s] an oath ... 'to faithfully and impartially discharge all the duties incumbent on me according to the best of my abilities and understanding, **agreeably to the constitution** and laws of the United States" (*id.*, 5 U.S. at 180 (emphasis added)), concluding rhetorically:

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [*Id.*, 5 U.S. at 180.]

Just because a court, even this Court, states a constitutional rule does not mean that what the court has said is either constitutional or supreme. Rather, as Article VI states, "This Constitution ... shall be the supreme law of the land...."[3]

According to petitioners, however, this declaration in Article VI does not mean what it says. Instead, they have premised

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[3] Even though this Court has stated in Cooper v. Aaron, 358 U.S. 1, 17 (1958), that "Marbury v. Madison ... declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," and therefore, that its "interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the surpeme law of the land," this broad statement does not mean that this Court is not bound by the constitutional text. As Justice Frankfurter, who joined in the Cooper decision, stated "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. O'Keefe, 306 U.S. 466, 491-92 (1938) (Frankfurter, J., concurring). *See also* Meese, "Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution," 61 *Tulane L. Rev.* 979 (1987).

their argument explicitly upon the proposition that this Court may "giv[e] meaning to contemporary truths about freedom, where earlier generations had failed to acknowledge and specify an essential aspect of liberty." Pet. Br. at 20. For example, petitioners have urged this Court to expand the constitutional definition of "liberty" to include "private consensual sexual intimacy," in part, because mental health professionals and other experts have determined that a "gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality." Pet. Br. at 16-17. Even though they claim that this kind of argument is no different from this Court's interpretation of "liberty" in prior cases (*see* Pet. Br. at 19-20), petitioners have constructed an argument not anchored in any way to the original text of the Constitution, but resting on the assumption that the constitution should be modified by this Court to conform to what petitioners have described as a firm break from the Nation's "prior legal tradition of criminalizing many adult choices about private sexual intimacy." Pet. Br. at 21. Additionally, petitioners have called for the overturning of Bowers v. Hardwick, 478 U.S. 186 (1986), not on the grounds that it was wrongly decided, but because, since Bowers, "the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case...." Pet. Br. at 30.

Petitioners' audacious claims constitute a direct assault on Article V of the Constitution which specifies only two means by which the enduring principles of the Constitution may be changed, one by constitutional convention and the other by state legislative ratification of an amendment proposed by Congress.[4] It emphatically does not include changes in the criminal law

[4] Petitioners are seeking what Justice Harlan described as "nothing less than an exercise of the amending power [by the Supreme Court]." Reynolds v. Sims, 377 U.S. 533, 591 (1964).

that have been taking place "[o]ver the last half century" (Pet. Br. at 21-25), nor in "legal, political, and social development[s]" that have taken place since Bowers. *See* Pet. Br. at 30-32. In essence, Petitioners have invited this Court to amend the Due Process and Equal Protection clauses to conform to changes in sexual mores in American society. This Court should decline petitioners' invitation.

B. Petitioners' Arguments Rest upon an Illegitimate View of this Court's Power of Judicial Review.

In order that courts not elevate themselves above the constitution in the exercise of their constitutional duty of judicial review, Chief Justice Marshall's successor, Chief Justice Roger B. Taney, for an unanimous court, articulated the "principle of construction" binding upon the courts when "expounding the Constitution of the United States":

> [E]very word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added.... Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).]

Thus, "to disregard [the] deliberate choice of words and their natural meaning" has been considered by this Court to "be a departure from the first principle of constitutional interpretation." Wright v. United States, 302 U.S. 583, 588 (1938). Moreover, to ignore the constitutional text in favor of a rule of constitutional interpretation based upon "extrinsic circumstances," as Chief Justice Marshall stated in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819), "would be

dangerous in the extreme":

> [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. [*Id.*]

Remarkably, petitioners have made no effort whatsoever to couch their due process and equal protection arguments within the four corners of the constitutional text. To the contrary, their brief is dominated by citations to state criminal statutes, law review articles, and sociological and psychological authorities. *See especially* Pet. Br. at 17-18 and fn. 10-12, 20, 25, 30, 34-35. True, petitioners have sprinkled their brief with citations and quotes from constitutional opinions of this Court, but these are lifted out of context, both factual and legal. Petitioners' use of language from Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973), and their citation to Planned Parenthood of S. E. Pa. v. Casey, 505 U.S. 833, 851 (1992), is illustrative:

> Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). One's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. *Cf. Casey*, 505 U.S. at 851. Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. [Pet. Br. at 12-13 (footnote omitted).]

When placed in context, petitioners' quotation from Paris Adult Theatre is highly misleading:

> The sum of experience, including that of the past two decades, affords ample basis for legislatures to conclude that *a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality*, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. [Paris Adult Theatre I v. Slaton, 413 U.S. at 63 (N.B. the language from case quoted in Petitioner's Brief appears in italics).]

Had petitioners made accurate use of Paris Adult Theatre, they could not have utilized the selected passage as the foundation for reaching their conclusion that an "essential associational freedom" includes "the freedom to structure one's own private sexual intimacy with another adult." To the contrary, the passage that immediately followed the one quoted in petitioners' brief provides no support for their position:

> It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice.... Totally unlimited play for free will, however, is not allowed in our or any other society.... [Some] laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. [*Id.*, 413 U.S. at 63-64.]

In an effort to escape the implications of Paris Adult Threatre I, petitioners have interposed a citation to Casey, but there is nothing in Casey that says anything about "sexual orientation,"

"choice of one's partner" or "how to connect sexually." *See* Casey, 505 U.S. at 851.

By their misuse of Paris Adult Theatre I and Casey, petitioners have confirmed the necessity for Chief Justice Marshall's admonition in Sturges, not to allow "extrinsic circumstances" to determine the meaning of a constitutional text, but to discern the meaning from the words themselves within the structure of the written constitution. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-24 (1819).

C. Petitioners' Arguments Disregard the Fourteenth Amendment's Federalist Structure.

Underlying petitioners' entire brief is the assumption that the United States of America is a unitary civil society in which every state must conform its public policy to a national norm. Thus, in support of their due process privacy contention petitioners have argued that (1) "the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy" (Pet. Br. at 21), (2) "the Nation has continued to reject the extreme intrusion into the realm of personal privacy" (Pet. Br. at 30), and (3) "the Nation has steadily moved toward rejecting second-class-citizen status for gay and lesbian Americans" (Pet. Br. at 30-31).

In support of their equal protection claim, petitioners have similarly argued (1) "our Nation has no legal tradition making the criminality of private sexuality turn on whether a couple is homosexual or heterosexual," and (2) "the laws of this Nation have reflected and played a role in virulent anti-gay discrimination over the last century" (Pet. Br. at 45).

As a matter of fact, however, the change in the criminal law governing human sexual conduct has come about state by state,

grounded upon policy considerations concerning the limits on the criminal sanction,[5] and not upon a monolithic national plebiscite on the morality of private adult homosexual conduct, as petitioners have implied. *See* Pet. Br. at 21-24.

In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court rejected the proposition that the Fourteenth Amendment's Due Process and Equal Protection Clauses imposed a national standard of substantive individual rights upon the states. In doing so, the Court affirmed that the Fourteenth Amendment was not designed to constitutionalize the exercise of the several States' police powers, but left it to the individual States to formulate and implement their policies governing the health, safety, welfare, and morals of the people, subject only to the procedural requirements of the Due Process Clause and the anti-racial discrimination policy of the Equal Protection Clause. *Id.*, 83 U.S. at 74-82.

While the narrow interpretation of the two clauses endorsed by the Slaughter-House Court has not been followed, this Court has not rejected its federalist principle. Rather, it has recently affirmed that the Fourteenth Amendment should not be construed in such a way as to permit Congress, in the exercise of its enforcement powers under Section 5, "to intrude into the traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." City of Boerne v. Flores, 521 U.S. 507, 521 (1997). Indeed, in two recent cases this Court has struck down congressional efforts under the Commerce Clause because they intruded upon the police powers preserved to the States by the Tenth Amendment. United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

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[5] *See* H. Packer, *The Limits of the Criminal Sanction* 301-12 (Stanford Univ. Press: 1968).

In Lopez, the Court ruled against an expansive view of the federal commerce power lest it enable Congress to "regulate any activity found related to economic productivity of individual citizens: family law (including marriage, divorce, and child custody) [and] even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.*, 514 U.S. at 564. In Morrison, the Court not only struck down an effort by Congress to criminalize "gender-motivated violence," as outside of the scope of the Commerce Clause, but it also rejected the claim that Congress had authority under the Fourteenth Amendment to enact a statute providing for a civil remedy against the perpetrator of a gender-motivated violent crime even though Congress had marshaled evidence that such a statute was designed to combat "pervasive bias in various state justice systems against victims of gender-motivated violence." Morrison, 529 U.S. at 619. Again the Court emphasized that the limitations placed on the exercise of congressional power under the Fourteenth Amendment were "necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.*, 529 U.S. at 620. In support, the Court, citing Boerne, stated that both history and contemporary belief affirms that "the [Fourteenth] Amendment 'does not concentrate power in the general government for any purpose of police government within the States.'" *Id.*, 529 U.S. 620-21.

Although these rulings concern the power of Congress under Section 5 of the Fourteenth Amendment, the same federalist principles have informed and limited the power of the courts in construing the reach of the Fourteenth Amendment. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883). Additionally, in construing the substantive due process and equal protection guarantees, this Court has been acutely aware of the limits placed upon the exercise of judicial power by both "the

language [and] design of the Constitution." Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). Thus, in Bowers, the Court declined to take an "expansive view of [its] authority to discover new fundamental rights embedded in the Due Process Clause." *Id.*, 478 U.S. at 194.

In their brief, petitioners have advanced arguments that, if accepted by this Court, cannot be confined to striking down the Texas statute criminalizing homosexual conduct. With respect to their Due Process contentions, their reliance upon modern trend to decriminalize such conduct as support for constitutionalizing that trend is equally applicable to similar trends in the areas of outlawing discrimination against "sexual orientation" in housing, public employment, public accommodations, and other areas, as well as hate crimes, and child adoption. *See* Pet. Br. at 17-19. Thus, at bottom, petitioners' due process arguments rest upon a claim that heterosexuals and homosexuals should be treated alike, lest "gay and lesbian Americans" be reduced to second class citizenship. *See* Pet. Br. at 16, 18, 30-31. Indeed, petitioners' equal protection claim rests explicitly upon the proposition that Texas's Homosexual Conduct Law "make[s] gay people unequal in myriad spheres of everyday life and continue[s] an ignominious history of discrimination based on sexual orientation." Pet. Br. at 34. Thus, petitioners condemn the criminalization of homosexual conduct because it "formalizes [a] pejorative classification of lesbians and gay men as second-class citizens," not entitled to the same child custody and visitation rights, foster parent rights, and employment opportunities as heterosexuals. Pet. Br. at 41-44.

In summary, petitioners' due process and equal protection contentions go far beyond this case: Not only must homosexual conduct be decriminalized, but any and all distinctions based upon "sexual orientation" must be discarded in favor of a new

definition of "family" that would include recognition of homosexual unions on the same basis as heterosexual. *See* Pet. Br. at 16-19. Such a wholesale adoption of the gay rights agenda to be imposed upon the states as a matter of law is insupportable, unwarranted either by the constitutional text or by this Court's opinions.

II. THE "ADULT" CHOICE TO ENGAGE IN PRIVATE CONSENSUAL HOMOSEXUAL SEX IS NOT A LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners have frankly admitted that their claim — that adults have a "fundamental right" to engage in homosexual sodomy — is not "enumerated" in the Due Process Clause of the Fourteenth Amendment. Pet. Br. at 10. Instead, they claim that such a right may be extrapolated from this Court's recognition of "three well-recognized aspects of personal liberty — in intimate relationships, in bodily integrity, and in the privacy of the home." Pet. Br. at 11. Thus, according to petitioners, "[t]he well-established fundamental interests in intimate relationships, bodily integrity, and the sanctity of the home all converge in the right asserted here." Pet. Br. at 9. This is not true. Neither this Court's opinions nor the text of the Fourteenth Amendment Due Process Clause guarantees an adult's choice to engage in consensual homosexual sex.

A. Petitioners' Claimed Liberty Interest Has No Support in this Court's Opinions.

1. Intimate Relationships. Cobbling together isolated phrases lifted from Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984), Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), Eisenstadt v. Baird, 405 U.S. 438, 453 (1972),

Planned Parenthood of S.E. Pa. v. Casey, *supra*, 505 U.S. at 851, 852, 898 (1992), and Paris Adult Theatre I v. Slaton, *supra*, 413 U.S. at 63, petitioners have created a new "associational freedom" — never before recognized by this Court — "to structure one's own private sexual intimacy with another adult." Pet. Br. at 11-12.

In Roberts v. United States Jaycees — upon which petitioners have placed primary reliance for their claim of a well-recognized general liberty interest in "intimate associations" — this Court stated just the opposite, asserting that "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of **certain** kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.*, 468 U.S. at 618 (emphasis added). In support of this proposition the Court cited two of its most venerable precedents, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), and Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In Meyer, the Court laid down the legal parameters by which it would be governed in determining whether any particular claim of individual liberty was protected by the Due Process clause of the Fourteenth Amendment:

> While this Court has not attempted to define with exactness the liberty thus guaranteed.... Without doubt, it denotes not merely freedom from bodily restraint, but also the right..., **generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.** [Meyer v. Nebraska, *supra*, 262 U.S. at 399 (emphasis added).]

While the Court in Roberts recognized that the common law boundary set by Meyer had been extended, it did not embrace the open-ended case for "intimate associations" claimed by

petitioners. To the contrary, the Court reaffirmed that recognition of "certain kinds of personal bonds" as within the concept of ordered liberty depended upon whether such bonds "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." Roberts v. United States Jaycees, 468 U.S. at 618-19.

Following these recognized common law and traditional guidelines, as reaffirmed in Roberts, this Court in Bowers v. Hardwick, declined to recognize that Fourteenth Amendment "liberty" included a "fundamental right to homosexuals to engage in acts of consensual sodomy," dismissing such a claim in the light of long tradition criminalizing such conduct as "at best, facetious." *Id.* 478 U.S. at 192-94. Contrary to petitioners' assertion (*see* Pet. Br. at 30-32), then, Bowers is not an "isolated decision," undeserving the protection of the principle of stare decisis. Rather, Bowers represents a correct application of this Court's precedents protecting, in the language of Roberts, only those intimate associations that have played a "critical role in the culture and tradition of the Nation."

2. Bodily Integrity. Petitioners' case for overturning Bowers fares no better if it is based upon precedents that, according to petitioners, establish a liberty interest in "bodily integrity." Mining Casey, Washington v. Glucksberg, 521 U.S. 702 (1997), Rochin v. California, 342 U.S. 165, 166, 173-74 (1952), and Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 278 (1990), petitioners have claimed to have found an established liberty interest in "control over one's body ... in sexual relations, involving as they do the most intimate physical interactions conceivable." Pet. Br. at 13. Again, petitioners have made a wholly unwarrantable claim that this Court has recognized a wholesale right in "bodily integrity," when the very cases cited by petitioners prove otherwise.

In Casey, as one of the quoted passages in petitioners' brief clearly indicates, the references to bodily integrity were in support of a pregnant woman's right to an abortion, not to "bodily integrity" generally. That right, in turn, was premised in Roe v. Wade, 410 U.S. 113 (1973), on an assessment of common law history reflecting, in the majority's opinion, a limited right of a woman to obtain an abortion. *Id.*, 410 U.S. at 140-41. After Casey, when presented with a claim that physician-assisted suicide also qualified as a protected liberty interest, this Court declined to so rule, noting that there was no evidence either of a common law or a traditional "right" to commit suicide, and thus, the claim fell short of the first of two primary features of "substantive-due process analysis." Glucksberg, 521 U.S. at 710-15, 720-23. Furthermore, this Court reiterated its position that any due process substantive liberty claim must be carefully and specifically described, not based upon generalities such as the ones employed by petitioners in their brief. *Id.*, 521 U.S. 723-27. *See also* Cruzan, 497 U.S. at 269-71, 278-79.

A correct reading of Casey in light of Glucksberg and Cruzan, then, is that this Court has recognized a liberty interest in "bodily integrity" where such an interest has long been established at common law, or where the common law did not clearly condemn the claimed interest. As pointed out in Bowers, any claim of a right to engage in sodomy based upon an asserted interest in "bodily integrity" fails because of the unequivocal common law condemnation of the practice. Bowers, 478 U.S. at 192. Whatever has happened since Bowers cannot change that fact.

3. The Privacy of the Home. Petitioners' final appeal is that there is an established liberty interest in private adult consensual sodomy because of the "deeply entrenched interest in the privacy of the home." Pet. Br. at 14. Once again,

petitioners have taken isolated sentences from this Court's opinions and constructed a new privacy right out of whole cloth, elevating the home to a safe "sanctuary, privileged from prying eyes" (Pet. Br. at 15, n. 9), a "safe" harbor from government intrusions. Pet. Br. at 14-15. Citing First and Fourth Amendment cases, as well as from the standard privacy repertoire of Griswold v. Connecticut, 381 U.S. 479 (1965), and Stanley v. Georgia, 394 U.S. 557 (1969), petitioners have carved out a privacy right that, unlike all but Griswold, found a right that is shaped primarily by the fact that the activity in question was taking place in the home. This point is especially significant in assessing the legitimacy of petitioners' analogical reasoning from the Fourth Amendment cases. There is no doubt that the home has received heightened protection of the Fourth Amendment's warrant requirement, but it has never been recognized as a constitutionally protected "sanctuary," immunizing its occupants from any government intrusion whatsoever, or protecting from such intrusions when the probable cause relates to intimate activity engaged in consenting adults. *Cf.* Bowers., 478 U.S. at 195-96.

On the other hand, the Fourth Amendment warrant requirement has been tailored to whether a search and seizure takes place in a home,[6] a hotel room,[7] a car,[8] an open field,[9] or a commercial establishment.[10] Petitioners, however, have not contended in this case that the right to engage in consensual

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[6] Kirk v. Louisiana, 536 U.S. 635 (2002).

[7] United States v. Jeffers, 342 U.S. 48 (1951).

[8] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[9] Oliver v. United States, 466 U.S. 170, 176-77 (1984).

[10] Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

homosexual conduct varies depending whether it takes place in the home, as contrasted to a hotel room, a car, a secluded place on a beach, or even in a private room made available to a couple by a commercial bathhouse. For this reason alone, petitioners' effort to link their claim to the "privacy of the home" interests should be dismissed as specious.

B. Petitioners' Claimed Liberty Interest Has No Support in the Fourteenth Amendment's Due Process Clause.

Apart from including the due process language in the Fourteenth Amendment in the Statutory and Constitutional Provisions section of their brief, petitioners have paid no attention whatsoever to the text, context and history of the Due Process Clause of the Fourteenth Amendment. And for good reason. Neither the text, nor the context, nor the history of the Due Process Clause provides any support for petitioners' claim.

1. Person. Texas Penal Code Section 21.06 provides that "[a] **person** commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." (Emphasis added.) In their Argument Summary, Petitioners claim that this section of the Homosexual Conduct Law is unconstitutional, but only as applied to "adults," not as applied to persons who are not adults:

> Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of **adulthood**." [Pet. Br. at 8 (emphasis added).]

> Fundamental liberty and privacy interests in **adults'** private, consensual sexual choices are essential to the ordered liberty our Constitution protects. [Id. (emphasis added).]

Throughout Argument I, petitioners have consistently identified the liberty interest they claim as one enjoyed by "adults."[11]

According to petitioners, then, the fundamental right to engage in private consensual sodomy is limited to adults. But the Due Process Clause applies to "persons," not just to adults. As this Court has consistently held in its abortion opinions, the liberty interest enjoyed by a woman to terminate her pregnancy extends to minors, as well as to adults. *See, e.g.,* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not ... come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, ... possess constitutional rights.") While the minority status of a person may be a factor permitting certain due process restrictions upon her access to an abortion that could not be placed upon that person if she were an adult, her minority status does not mean that she has no liberty interest at all. *See* H. L. v. Matheson, 450 U.S. 398 (1981). By claiming that only adults have a liberty interest protected by the Due Process Clause, petitioners have done violence to the text, relegating minors to nonpersons, without any effort whatsoever to provide textual support for their position. *Compare* Roe v. Wade, *supra*, 410 U.S. at 156-57.

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[11] "All adults have the same fundamental liberty interests in their private consensual sexual choices." Pet. Br. at 11. "The adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association." *Id.* at 12. "For many adults in modern society, sexual intimacy is an important aspect of forming or building committed relationship where one does not already exist." *Id.* at 12, n. 8. "If heterosexual adults have a fundamental interest in consensual sexual intimacy ... then so too must homosexual adults." *Id.* at 19. "[B]oth evenhanded and discriminatory bans on private sexual conduct between consenting adults have been rejected in contemporary times." *Id.* at 22. "Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy." *Id.* at 25.

Had petitioners attempted to provide textual support for their position, it would have failed. As this Court pointed out in Roe, the "Constitution does not define 'person' in so many words." *Id.,* 410 U.S. at 156. Nevertheless, there are several provisions in that document decisively indicating that "person," standing alone, cannot be limited by age. *See* Article I, Section 2, Clause 2 (" No person shall be a Representative who shall not have attained the age of twenty five"); Article I, Section 3, Clause 3 ("No person shall be a Senator who shall not have attained to the Age of thirty years"); and Article II, Section 1, Clause 5 ("Neither shall any person be eligible to that Office [President] who shall not have attained the Age of thirty five years.") By not placing any age limitation upon the Due Process text, the Fourteenth Amendment's use of the word, person, like the Fifth Amendment, mirrors the definition of person found in Webster's 1828 Dictionary: "An individual human being consisting of body and soul.... A man, woman or child."

2. Liberty. Liberty, like person, is not defined within the four corners of the Constitution. But the word does appear in two other places, the Fifth Amendment and the Preamble. Both provisions shed light on the meaning of the term.

Both the Fifth Amendment and the Fourteenth Amendment use "liberty" in relationship to due process and, except for a slight difference in phrasing, contain identical due process language, the Fifth applying to the federal government and the Fourteenth applying to the States. On their face, there is no reason to give a different definition to any of the key terms, even though the Fifth Amendment was ratified and made a part of the Constitution in 1791 and the Fourteenth in 1868. Indeed, the right not to be deprived of one's life, liberty, or property has ancient roots, traceable all the way back to the "law of the land" chapter of the 1215 Magna Carta. *Sources of Our Liberties* 5-6

(R. Perry, ed., ABA Law Found.: 1972) (hereinafter "*Sources*"). Even at the time of America's founding, the right to due process was still being stated in "law of the land" terms, although in restating the right, the word "liberty" became attached to it. Thus, Section 8 of the June 1776 Virginia Declaration of Rights read, in part: "that no man be deprived of his liberty, except by the law of the land." *Sources,* at 312. *Accord,* Article IX, *Aug. 1776 Constitution of Pennsylvania,* reprinted in *Sources* at 330. Thereafter, several state constitutions added "life" and "property" to their "law of the land" provisions. *See*, e.g., Article XXI, *1776 Constitution of Maryland*, reprinted in *Sources* at 348. The Fifth Amendment tracked these early state developments, incorporating verbatim "life, liberty or property," but substituting due process of law for law of the land.

The state constitutional commands protecting "liberty" by due process of law, then, predated both the Fifth and Fourteenth Amendments. Significantly, these state constitutions contained language defining the substantive meaning of liberty. According to the *1776 Pennsylvania Constitution*, "liberty" was a "natural, inherent and inalienable right," not one created by the constitution, but preexisting in the nature of things. Article I, *1776 Pennsylvania Constitution*, reprinted in *Sources* at 329. *Accord,* Section 1, *1776 Virginia Constitution*, reprinted in *Sources* at 311. This same notion of a preexisting natural right of liberty is affirmed in the Preamble to the United States Constitution, which states that the Constitution was "ordain[ed] and establish[ed]," in part, to "**secure** the blessings of liberty to ourselves and our posterity." (Emphasis added.) This language, in turn, tracked the words of the nation's charter, the Declaration of Independence, which states that "governments are instituted among men" to "**secure**" the "inalienable rights of life, liberty and the pursuit of happiness." The Declaration,

like the early Virginia and Pennsylvania Constitutions, identifies those inalienable rights as preexisting. In the case of the Declaration, and hence the United States Constitution, those rights are "endowed by the Creator" and enjoyed by all mankind because "all men are created equal."

The original substantive concept of liberty, embraced by the Constitution, including the Fifth and Fourteenth Amendments, must be understood as having been established by the Creator, and thus preexisting according to the created nature of the mankind, not as having been established according to societal conventions, constitutional, communitarian, or otherwise. In this case, however, Petitioners have adopted the latter, rather than the former, as the source of their substantive definition of liberty. In their brief petitioners make no reference to any preexisting natural right to engage in homosexual conduct, but only to an evolutionary conventional right derived from the way people live — "Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country" (Pet. Brief at 16) — and reinforced by selected opinions of sociological and psychological professionals — "Mental health professionals have universally rejected the erroneous belief that homosexuality is a disease." *Id.* at 16. Such a view of liberty may support a gay and lesbian **political** agenda, but it provides no support whatsoever for the establishment of a **constitutional** right.

To the contrary, liberty — when used in a constitution — is not a sociological or psychological term. Rather, it is a legal term, and as established in Part I. A. above, a legal term unchangeable by ordinary means, and thus determined by its original meaning, not by any evolutionary process. At the time of America's founding, a "natural liberty of mankind" was constrained by "the law of nature." I W. Blackstone, *Commentaries on the Laws of England* 121 (U. Chi. Facsimile Ed.: 1765). The law of nature, in turn, was the will of the

Maker of the universe and of all mankind, as revealed in nature; and no human laws could be of any validity if contrary to this original law. *Id.* at 39-40, 41. According to the "law of nature," sex between human beings of the same sex was a "crime against nature," deserving punishment, not commendation. IV W. Blackstone's *Commentaries* at 215-16.

Thus, if this Court should affirm petitioners' claim that the substantive meaning of liberty in the Fifth and Fourteenth Amendment's Due Process clauses has evolved to include freedom of choice to engage in homosexual sex — determined at the time the Constitution was ratified to be a "a disgrace to human nature" and "a crime not fit to be named" (IV Blackstone's *Commentaries* at 215-16) — then it would be rejecting the divine source of rights upon which this nation was founded. *See* Titus, "Defining Marriage and the Family," 3 *Wm. & Mary Bill of Rights J.* 327, 337-41 (1994).

This Court got it right in Bowers, when it ruled that liberty could not possibly be construed to embrace a right to engage in homosexual conduct in light of the historic fact that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights." Bowers, 478 U.S. at 192. To have ruled otherwise, would have made a mockery of the founder's understanding that the very essence of a written constitution is to preserve the people's "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness" and that of their posterity. *See* Marbury v. Madison, *supra,* 5 U.S. at 176.

III. THE EQUALITY PRINCIPLE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT A LAW DISCRIMINATING BETWEEN HOMOSEXUAL AND HETEROSEXUAL CONDUCT.

After having devoted the first 22 pages of their Argument to the claim that Texas Code Section 21.06 denies to "gay and lesbian Americans" the same freedom of choice "as heterosexuals in private consensual sexual intimacy" (Pet. Br. at 16), Petitioners have invested their concluding 18 pages to the claim that gay and lesbian Americans are being discriminated against for engaging in an activity in which they have no choice. Indeed, the explicit premise of the petitioners' equal protection argument is that neither homosexuals nor heterosexuals have any real choice over their sexual lives, they are just differentially sexually oriented:

> There are no valid concerns of the government here that correlate with sexual orientation, which is a deeply rooted personal characteristic that we all have. [Pet. Br. at 39.]

Thus, petitioners have contended that while ostensibly the Texas statute condemns homosexual conduct, in reality, it "brand[s] gay citizens as criminals by virtue of their sexual orientation." Pet. Br. at 41.

According to this line of reasoning, there can be no possible moral foundation for Texas to discriminate between homosexuals and heterosexuals. After all, no one can be condemned for behaving in the way that he or she has been

programmed to behave.[12] Therefore, one cannot but conclude that the Texas legislature has enacted Texas Code Section 21.06 solely on the basis of a majority heterosexual's "negative attitude toward those with a particular personal characteristic," not because of any true "moral" condemnation. Pet. Br. at 39.

The first problem with petitioners' argument is that they have assumed the very thing that they must prove, namely, that sexual orientation is an immutable characteristic implanted at birth like the color of one's skin or sex, in order to sustain their claim that they are being denied equal protection of the laws. *See,* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The second problem is even more fundamental. Petitioners must prove that one's sexual orientation absolutely compels one to engage only in sexual intercourse consistent with that orientation. Otherwise, the Homosexual Conduct Law is no more a condemnation of a person's homosexual orientation than a murder statute is a condemnation of a person's homicidal orientation.

Not surprisingly, petitioners have attempted neither task. Instead, they have subtly shifted the burden of having to prove a violation of the equal protection clause, placing the burden on Texas that Section 21.06 does not violate equal protection principles.

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[12] Instead, Petitioners believe that the ones who should be condemned are – those who offer "discredited 'therapies' to 'change' the very sexual orientation of gay adults [for] continu[ing] th[e] destructive pathologizing of gay citizens." Pet. Br. at 46. By enacting Texas Code Section 21.06, the Texas legislature should also be condemned for "brand[ing] gay persons, as second-class citizens and legitimiz[ing] discrimination against them in all aspects of life." Pet. Br. at 40-41.

A. Having Failed to Negative Any Conceivable Rational Basis for Texas Code Section 21.06, Petitioners Have Failed to Meet Their Burden to Prove an Equal Protection Violation.

According to petitioners, "[u]nder the Equal Protection Clause, the classification — the different treatment of different people — ... must be justified" by the State. Pet. Br. at 34. Thus, they have contended, Texas must justify its decision to criminalize "deviate sexual intercourse" between persons of the same sex, but not such intercourse between persons of the opposite sex. After reviewing the Texas justifications, petitioners have concluded:

> Texas offers nothing more than the majority's negative moral judgment to support its discrimination, and that should end the matter with a ruling of unconstitutionality. [Pet. Br. at 40.]

Petitioners have grossly misstated the law. First, contrary to petitioners' contention, Texas does not have the burden to justify its having distinguished between homosexual and heterosexual conduct in criminalizing deviate sexual intercourse. To the contrary, the very case cited by the petitioners in support of their argument that Texas bears the burden of justification says just the opposite:

> [T]he State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative "any conceivable state of facts that could provide a rational basis for the classification." [Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001).]

Second, "under rational-basis review, where a group

possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Id.* In this case, petitioners have not shown that its differential treatment of homosexual and heterosexual deviate intercourse is not permissible to reinforce the moral foundation of its family policy that permits heterosexuals, but not homosexuals, to marry. *See* Lawrence v. Texas, 41 S.W.3d 349, 354 (2001), citing Grigsby v. Reib, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913).[13] If the benefits of marriage may be withheld on such a differentiated basis, then so can different burdens be imposed upon the two classes because they are not similarly situated. *See, e.g.,* McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807-11 (1969).

B. Having Failed to Show that Section 21.06 Has No Legitimate Purpose, Petitioners Have Failed to Sustain Their Burden to Prove an Equal Protection Violation.

Petitioners have argued that "Section 21.06 ... use[s] a sexual-orientation-based classification." Pet. Br. at 32, n. 24. It does not. The phrase "sexual orientation" does not appear in the statute, and thus, is not an element of the offense. A person whose sexual orientation is heterosexual may be convicted of the crime of deviate sexual intercourse, just the same as a

[13] According to Grigsby, Texas marriage policy is rooted not in societal convention, but in a system of "duties and obligations that have existed ... before civil government was formed": "[A] status ordained by God, the foundation and support of good government, and absolutely necessary to the purity and preservation of good society." *Id.*, 153 S.W. at 1129, 1130. *See also* Titus, "Defining Marriage and the Family," *supra*, 3 *Wm. & Mary Bill of Rights J.* at 342-43.

person whose orientation is homosexual. Lawrence v. Texas, *supra,* 41 S.W.3d at 353. To prove otherwise, petitioners must show that persons with a heterosexual orientation would **never** engage in sexual intercourse with a person of the same sex. Petitioners have suggested that such is the case, but they have offered no such evidence. Pet. Br. at 32-34. Because petitioners have failed to show that people's behavior is fixed by their sexual orientation, petitioners' case that Section 21.06 violates the equal protection clause by discriminating against persons with a same-sex orientation fails miserably.

In order, then, for petitioners to make a case, they must prove that the Texas legislature acted with an illegitimate purpose. Other than making the bald assertion that the Homosexual Conduct Law has "targeted" gay people, petitioners have rested their case of purposeful discrimination on "a century-long history of discrimination against gay Americans." Pet. Br. at 41, 46. Thus, petitioners have argued that "even in the absence of actual arrest and prosecution, the Homosexual Conduct Law labels gay men and lesbians as criminals and legitimates discrimination against them on that basis." Pet. Br. at 44. One could say the same thing about laws prohibiting incest, adultery, bestiality, and adult sex with children. After all, according to petitioners' world view those who engage in such crimes are only acting in the way that their particular orientation compels them. One might even say the same thing about laws prohibiting murder, theft, or any other of a host of statutes prohibiting certain conduct.

At bottom, petitioners' argument denies that, with regard to sexual behavior, there are moral choices, only preferences predetermined by "a deeply rooted personal characteristic," a "status" for which none may be held responsible. *See* Pet. Br. at 39-40. Ironically, by making this claim they are reducing themselves and all other human beings — at least in relation to

sexual behavior — to something less than human, which is a distortion of the original purpose of the equal protection clause. As Justice John Marshall Harlan put it, in his dissenting opinion in Plessy v. Ferguson, 163 U.S. 537 (1896), the equal protection clause was designed to guarantee that the law will "regard[] man as man." *Id.*, 163 U.S. at 559. Petitioners have argued otherwise, pressing this Court to adopt their deterministic views about sexual behavior. It is one thing for a state legislature to embrace such an agenda; it is quite another for this Court to enshrine as part of the Fourteenth Amendment's equality principle the notion that adults are so helplessly in bondage to a sexual proclivity that no legitimate moral judgment can be made about their sexual actions — so long, of course, as those actions are consensual and private.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of Texas, Fourteenth District, should be upheld.

Respectfully submitted,

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